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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Case No. 3:05-cv-00273-JWS

JOINT STATEMENT AND PRETRIAL REPORT

16 Complying with this Court's Order dated March 25, 2008, at docket 90, the
17 parties provide the following joint statement and pretrial report.

18 The parties have consulted and jointly prepared the following responses to
19 this Court's Order at docket 90:

A. ISSUES:

1. Statement of Issues (Plaintiff Statement of Issues).

a. Claim Under 42 U.S.C. § 1983.

Mitchell must prove the following legal elements in order to establish a claim under 42 U.S.C. § 1983:

- 1) as to each defendant, that defendants, Municipality of Anchorage,
2 Walter Monegan, Officer Henikman, and Officer Voss, were acting
3 under color of state law when detaining Mitchell;
- 4) 2) as to each defendant, that defendants, Municipality of Anchorage,
5 Walter Monegan, Officer Henikman, and Officer Voss, by detaining
6 Mitchell deprived her of a right, privilege, or immunity secured by the
7 Constitution or laws of the United States.

9
10 b. Defamation: Slander per se.

11
12 Mitchell must prove the following legal elements to establish a claim of
13 defamation: slander per se:

- 14 1) that there occurred a false and defamatory statement;
- 15 2) that there occurred an unprivileged publication of the false and
16 defamatory statement to a third party;
- 17 3) that there existed fault amounting at least to negligence on the part of
18 the publisher; and
- 19 4) that there exists "per se" actionability.

20
21 c. Intentional Infliction of Emotional Distress.

22
23 Mitchell must prove the following legal elements to establish a claim of
24 intentional infliction of emotional distress:

- 1) that the conduct of defendants, by arresting Mitchell, pointing
2 weapons at her, having her standing handcuffed in public view, and
3 separating her from her child, were extreme and outrageous;
 - 2) that the conduct of defendants, by arresting Mitchell, pointing
3 weapons at her, having her standing handcuffed in public view, and
4 separating her from her child, were intentional or reckless;
 - 3) that the conduct of defendants, by arresting Mitchell, pointing
4 weapons at her, having her standing handcuffed in public view, and
5 separating her from her child, caused her emotional distress; and
 - 4) that Mitchell's emotional distress is severe.
- 13 d. False Arrest.

14 This cause of action has been established and as a matter of law occurred.
15

16
17 2. **Statement of Issues (Defendant's Affirmative Defenses).**

18 Defendants must establish the following legal elements to prevail on
19 their affirmative defenses:

- 20 a. Qualified immunity, Sec. 1983:
- 21 1) They did not violate Plaintiff's Fourth Amendment rights.
 - 22 2) If they did violate Plaintiff's Fourth Amendment rights, they
23 could reasonably, but mistakenly, have believed that their actions
24 did not violate her clearly established Fourth Amendment right.

- 1 b. Qualified immunity, torts:
- 2 1) They did not commit the common-law torts alleged.
- 3 2) If they did commit the common-law torts alleged, they could
- 4 reasonably have believed that their actions were lawful.
- 5
- 6
- 7 c. Discretionary immunity, AS 09.65.070(d)(2):
- 8 1) Defendants acted and/or failed to act according to their
- 9 discretionary functions and/or duties as public officials.
- 10
- 11
- 12 d. Failure to state a claim:
- 13 1) Plaintiff's physical injury claim fails to state a viable cause of
- 14 action or a claim on which relief can be granted.
- 15
- 16 2) Plaintiff's training claim fails to state a viable cause of action or
- 17 claim on which relief can be granted.
- 18
- 19 3) Plaintiff's supervision claim fails to state a viable cause of action
- 20 or claim on which relief can be granted.
- 21
- 22 4) Plaintiff's Monell claim fails to state a viable cause of action or
- 23 claim on which relief can be granted.
- 24
- 25 e. Defendants' "statement" complained of was privileged because:
- 26 1) It affected important interests of the public and
- 27

1 2) Its publication to the public is otherwise within generally
2 accepted standards of decent conduct.
3
4

5 f. Defendants' "statement" complained of was privileged because:
6
7 1) It affected matters of public safety.
8 2) It affected the public interest.
9

10 g. Legal justification.
11
12 1) Defendants did not violate the law.
13 2) If Defendants did violate the law, their actions were justified,
14 because they had a duty to make a prompt investigation.
15 3) If Defendants did violate the law, their actions were justified,
16 because of necessity.
17

18
19 h. Good faith.
20
21 1) Defendants did not violate the law.
22 2) If Defendants did violate the law, they did so by mistake, and in
23 good faith.
24
25
26
27

1 **3. Plaintiff's Objections to Defendant's List of Affirmative Defenses.**

- 2 a. Plaintiff objects to any questions of qualified or discretionary immunity going
3 forward to the jury in this case. Plaintiff believes that issues of qualified or
4 discretionary immunity are legal issues, and not issues for the fact finder to
5 decide.

7
8 B. **STATEMENT OF UNCONTESTED FACTS**

- 9 1. On May 8, 2004, at approximately 3:30 p.m., a crime of violence, namely, a
10 bank robbery, occurred at the Wells Fargo bank, which is located near the
11 western end of the Sears Mall.
12
13 2. The robber, a woman, indicated to the bank teller that she had a gun.
14
15 3. The bank teller, and other witnesses, described the suspect as a black female
16 adult, heavy set, wearing a dark shirt, and carrying a bag. This descriptive
17 information was broadcast to police and FBI who responded.
18
19 4. Responding to the police broadcast, Officer Henikman and Officer Voss, of
20 the Anchorage Police Department, took up positions near the eastern end of
21 the Sears Mall, located along Benson boulevard.
22
23 5. At approximately the same time that the robbery occurred at the Wells Fargo
24 bank, located near the western side of the Sears Mall, Carolyn Mitchell, and
25 her 12 year old son Demarcus, were shopping for clothes at the Sears
26 department store, located at the extreme eastern side of the Sears Mall.
27
28 6. Carolyn Mitchell, a black female, was wearing a white Nike jumpsuit, and

1 was carrying shopping bags from Sears department store.

2 7. While Mrs. Mitchell was preparing to depart the Sears departments store,
3 armed police officers directed that all shoppers at the store quickly exit the
4 mall. The officers directed the shoppers, which included Carolyn and her son
5 Demarcus, to exit the mall through a exit along side the Sears department
6 store, leading toward Benson boulevard.

7 8. As Carolyn and Demarcus Mitchell departed the Sears Mall, along with the
8 other shoppers, Officer Henikman and Officer Voss, noticed Carolyn
9 Mitchell. The two officers believed Carolyn resembled the descriptive
10 information that had been broadcast. Based on that belief the officers,
11 pointed their weapons at Carolyn, and ordered people to "move away from
12 the black female." At the command of the officers, everyone moved from
13 Carolyn except her son Demarcus. The officers, upon seeing Demarcus
14 remain, instructed the black male to move from the black female. After the
15 second request, Demarcus moved away from his mother's side, leaving
16 Carolyn by herself.

17 9. After Demarcus moved away from Carolyn Mitchell, Officer Henikman, with
18 weapon pointed at her, told her to turn to turn around, and walk backward
19 toward his voice. Carolyn complied. As she moved backward, Officer
20 Henikman walked toward her and handcuffed her hands behind her back.
21 While Officer Henikman handcuffed Carolyn, Officer Voss continued to
22 point his weapon at her.

10. After handcuffing Mitchell, Officer Henikman walked her to his police vehicle. When Carolyn reached the police vehicle, Officer Henikman took her purse and searched its contents, and retrieved her identification. Carolyn was identified by a military identification card, and was physically searched for weapons. Officer Henikman did not find any weapons on Carolyn's person, nor did he find any weapons within her purse.

11. After being searched, and identified, Carolyn asked Officer Henikman if her son could use her cell phone to call his father. Officer Henikman did not permit Demarcus to use the phone. Officer Henikman also would not allow Demarcus to stand by his mother. Carolyn asked Officer Henikman why she had been detained, and the officer told her she would find out shortly.

12. Carolyn Mitchell remained in handcuffs for 20-30 minutes. During that time, she was told to stand near the police vehicle. While Carolyn stood in handcuffs near the police vehicle, people who knew her saw her as they drove by on Benson boulevard. Also, local broadcaster KTUU Channel 2 News filmed the scene at the mall. The coverage of KTUU News showed Carolyn Mitchell standing with her hands behind her back, although it did not show her handcuffs.

13. KTUU later broadcast the images which depicted Carolyn Mitchell, at least twice during its evening news programs. The broadcasts did not identify Mrs. Mitchell. The broadcast also stated that no arrests had yet been made by police.

16. Carolyn Mitchell experienced inconvenience, embarrassment, and emotional
10 distress as a result of her detention.
11

12 17. Carolyn Mitchell experienced further inconvenience, embarrassment, and
13 emotional distress as a result of the KTUU broadcasts, and because she was
14 exposed to what she believed to be public ridicule because people driving or
15 walking along Benson boulevard could have seen her in handcuffs, or
16 surrounded by police.
17

Respectfully submitted this 28th day of April 2008

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JOINT STATEMENT AND PRETRIAL REPORT:
MITCHELL V. MOA, POLICE DEPARTMENT, ET AL.

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3 Certificate of Service

4 I hereby certify that on April 28, 2008
5 I electronically filed the foregoing with
6 the Clerk of Court using the CM/ECF
7 system which sent notification to the
following:

8 Joyce Weaver Johnson

9 and I hereby certify that I have mailed by
10 United States Postal Service the document
to the following non CM/ECF participants:

11 none.

12 Dated this 28th day of April 2008, at Anchorage, Alaska.
13

14 S/ Isaac Zorea

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